No. 93-284

In The

# Supreme Court of the United States

October Term, 1993

SECURITY SERVICES, INC.,

*Petitioner,*

v.

K MART CORPORATION,

*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit**

## BRIEF FOR PETITIONER

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## QUESTION PRESENTED

Whether the Court of Appeals erred in concluding that the Interstate Commerce Commission has discretionary authority to retroactively void an effective tariff for noncompliance with ICC tariff publishing regulations?

## PARTIES TO THE PROCEEDING

The parties to the proceeding are set forth in the caption on the cover to this brief.



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## BRIEF FOR PETITIONER

## OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Pennsylvania, issued on September 9, 1993, is not reported. It is reprinted in the Appendix to the Petition for Writ of Certiorari (hereinafter referred to as "Pet. App.") Pet. App. 1a.-16a.

The decision of the panel of the United States Court of Appeals for the Third Circuit, issued on June 18, 1993, is reported at 996 F.2d 1516 (3rd Cir. 1993). It is reprinted at Pet. App. 1b. to 24b.

## JURISDICTION

The final judgment of the Court of Appeals was entered on June 18, 1993. Jurisdiction is proper pursuant to 28 U.S.C. § 1254(1), which provides for review by certiorari "upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree." The petition for writ of certiorari was granted on October 18, 1993.

## STATUTORY PROVISIONS INVOLVED

This case involves the following statutory provisions:

**49 U.S.C. § 10761. Transportation prohibited without tariff**

(a) Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device.

**49 U.S.C. § 10762. General tariff requirements**

(a)(1) A carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title (except a motor common carrier) shall publish and file with the Commission tariffs



containing the rates and (A) if a common carrier, classifications, rules, and practices related to those rates, and (B) if a contract carrier, rules and practices related to those rates, established under this chapter for transportation or service it may provide under this subtitle. A motor common carrier shall publish and file with the Commission tariffs containing the rates for transportation it may provide under this subtitle. The Commission may prescribe other information that motor common carriers shall include in their tariffs. A motor contract carrier that serves only one shipper and has provided continuous transportation to that shipper for at least one year or a motor carrier of property providing transportation under a certificate to which the provisions of section 10922(b)(4)(E) of this title apply or under a permit to which the provisions of section 10923(b)(5) of this title apply may file only its minimum rates unless the Commission finds that filing of actual rates is required in the public interest.

* * *

(e) The Commission may reject a tariff submitted to it by a common carrier under this section if that tariff violates this section or regulation of the Commission carrying out this section.

## STATEMENT OF THE CASE

This case arises from a civil action filed by the Security Services, Inc., formerly known as Riss International, Inc. ("Riss"), pursuant to 49 U.S.C. §§ 10761(a) and 11706(a), to recover freight charges for interstate transportation services performed by Riss for K Mart Corporation ("K Mart"). The rates, charges, rules and regulations

governing transportation using Riss's services were maintained in published tariffs on file with the Interstate Commerce Commission ("ICC" or "Commission"). J.A. 23-34. As pertinent here Riss tariff 501-B contained distance rates based upon mileage applying on various commodities between points in the United States. J.A. 25. That tariff further provided that distances would be determined by another tariff published and filed with the ICC by the Household Goods Carriers Tariff Bureau as agent for Riss. J.A. 27. This incorporation by reference of the distance guide into the rate tariff was authorized by the ICC's tariff regulation. 49 C.F.R. § 1312.30. Although at one time Riss had provided a power of attorney to the Household Goods Bureau as required by 49 C.F.R. § 1312.4(d), the Bureau terminated Riss from its list of carriers participating in the distance guide effective February 8, 1985, before the shipments at issue in this case had taken place. J.A. 11, 14 and 24.

The district court granted summary judgment in favor of K Mart finding that the distance rates published by Riss in tariff 501-B were invalid because, although the rate tariff referred to the mileage guide tariffs, Riss had allowed its participation in the distance guide to lapse. Pet. App. 13a. In reaching this conclusion the district court relied, *inter alia*, upon the ICC's decision in *Jasper Wyman & Son – Petition for Declaratory Order Certain Rates and Practices of Overland Express, Inc.*, 8 I.C.C. 2d 246 (1992), *rev'd sub nom., Overland Express, Inc. v. ICC*, 996 F.2d 1516 (D.C. Cir. 1993). Pet. App. 10a. In that case the ICC ruled that because the carrier did not have an effective power of attorney or concurrence with the Household Goods Carriers' Bureau and its participation in the



Mileage Guide HGB 100 Series was cancelled, Overland's mileage rates were void or ineffective as a matter of law under 49 C.F.R. § 1312.4(d)[1] and could not form the basis for the collection of the published rates in its ICC filed common carrier tariff.

The Court of Appeals affirmed the district court's grant of summary judgment to K Mart. Relying upon the voiding language in 49 C.F.R. § 1312.4(d), the Court of Appeals concluded that Riss' filed rates were void as a matter of law due to Riss' nonparticipation in the distance guide at the time of the shipments at issue here. Pet. App. 15b. In reaching this conclusion the court found that the ICC's retroactive voiding power was embraced by the ICC's discretionary authority. Pet. App. 18b.

## SUMMARY OF ARGUMENT

In *Interstate Commerce Commission v. American Trucking Associations, Inc.*, 467 U.S. 354 (1984) ("American Trucking"), the Court found that the ICC lacked explicit

[1] 49 C.F.R. § 1312.4(d) states as follows:

*Concurrences and powers of attorney.* Concurrences and powers of attorney shall not be filed with the Commission. However, a carrier may not participate in a tariff issued in the name of another carrier or an agent unless a power of attorney or concurrence has been executed. *Absent effective concurrences or powers of attorney, tariffs are void as a matter of law.* Should a challenge to a tariff be made on this basis, carriers will be required to submit the necessary proof. See also § 1312.10 (Emphasis added).

authority under the Interstate Commerce Act to retroactively reject an effective tariff. Specifically, the Court held that § 10762(e) did not give the ICC authority to retroactively reject effective tariffs. The Court found, nonetheless, that under the limited circumstances presented there, the ICC had discretionary authority to retroactively reject effective tariffs. This discretionary authority was limited to the situation presented there because the remedy furthered a specific statutory mandate of the Commission and the exercise of the rejection remedy was directly and closely tied to that mandate.

In applying the Court's decision in *American Trucking*, the Court of Appeals found that the language in 49 U.S.C. § 10762(a)(1) which authorizes the ICC "to prescribe other information that motor common carriers shall include in their tariffs" alone provided the requisite statutory mandate for the ICC to declare as void a tariff which violates ICC tariff publication rules. Pet. App. 19b. Such a result, of course, impermissibly attempts to apply § 10762 indirectly as a basis for retroactive rejection of tariffs in contravention of the Court's holding in *American Trucking* that that section of the Act did not grant the ICC such authority. Section 10762 sets forth detailed procedures for establishing and changing rates and provides that the ICC may reject a tariff if it violates that section or the regulations of the ICC carrying out that section. Clearly, however, the ICC cannot retroactively reject tariffs after such tariffs have been filed for violations of its publishing rules, for avoiding of tariffs would not further a specific statutory mandate of the Commission.

This court has previously held that an effective tariff may not be treated as nonexistent because it violates an



ICC publication regulation or even a substantive provision of the Act. Instead the carriers are strictly liable only for damages the shippers actually suffered. Yet the result that would be reached under the Court of Appeals' interpretation of the Commission's authority to promulgate rules relating to the publication of tariffs would reward shippers who have suffered no actual harm by allowing them to escape the application of filed tariffs and allow them to retain the benefit of a secret rate. The ICC's self-proclaimed power to declare effective tariffs void would not only impose extraordinary liability on carriers retroactively, but also completely undermine the Act's core purpose of public disclosure of common carrier rates.

## ARGUMENT

### A. THE COURT BELOW MISAPPLIED THIS COURT'S DECISION IN INTERSTATE COMMERCE COMMISSION V. AMERICAN TRUCKING ASSOCIATIONS, INC.

It is well-settled that a tariff, on file with the ICC, is not to be disregarded because of a defect in form, *Berwind-White Coal Mining Co. v. Chicago & E.R. Co.*, 235 U.S. 371, 375 (1914) or even if filed in violation of a substantive provision of the Interstate Commerce Act. *Davis v. Portland Seed Co.*, 264 U.S. 403, 425 (1924). The ICC also held this view until very recently. *Boren-Stewart Co. v. Atchison, T. & S.F. R. Co.*, 196 I.C.C. 120 (1933); *Acme Peat Products, Ltd. v. Acron, C. & Y. R. Co.*, 277 I.C.C. 641, 644 (1950). This court has never held that noncompliance with the ICC tariff publication rules results in the voiding of an effective tariff. In *American Trucking*, the Court

unanimously concluded that the ICC lacked explicit authority to reject an effective tariff. *American Trucking*, 467 U.S. at 355. A sharply divided Court, however, found that in the narrow circumstances presented there the ICC had discretionary authority to retroactively reject an effective tariff when a two part test is met: (1) the discretionary remedy must further a specific statutory mandate of the Commission, and (2) the exercise of the remedy must be directly and closely tied to that mandate. *Id.* at 367.

In 1980 Congress amended, to some extent, the Interstate Commerce Act, 49 U.S.C. § 10101 *et seq.* (hereinafter "Act").[2] The amendments generally relaxed the prior strict entry requirements in an effort to promote more competitive and economical transportation services. One central feature of the Act was retained without change, however – the requirement that motor common carriers publish their rates, rules and classifications in tariffs, file those tariffs with the ICC and strictly adhere thereto. See 49 U.S.C. §§ 10761(a) & 10762(a).

One of the central requirements of the Interstate Commerce Act is that common carriers subject to ICC authority may provide regulated services only pursuant to tariffs filed with the Commission.[3] *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990). Carriers are specifically forbidden to provide such service in the absence of tariffs and "may not charge or receive a

[2] Pub. L. 96-296, July 1, 1980, 94 Stat. 793.

[3] 49 U.S.C. § 10761(a) (Supp. V, 1981). Hereafter, all references to sections are to the current version of the Interstate Commerce Act printed in Supp. V, unless otherwise indicated.



different compensation" than the rate specified in the filed tariff. Section 10761(a). By requiring filed tariffs and strict compliance with them, the Act seeks to avoid unjust discrimination and to give shippers an advance opportunity to challenge proposed rates. *Maislin*, 497 U.S. at 126. To achieve this protection for shippers, while taking account of the interests of carriers, the Act provides a carefully balanced set of explicit procedures, remedies and penalties.

Careful analysis of the decision below indicates that the Court of Appeals misapplied this Court's decision in *American Trucking, supra.*[4] The Court of Appeals incorrectly upheld the ICC's authority to issue the regulation at issue here that voids an effective tariff relying on that language in 49 U.S.C. § 10762(a)(1) permitting the ICC to prescribe information to be contained in tariffs. Pet. App. 19b.

Unlike the ICC in *Jasper-Wyman*, the court below correctly begins with the premise that its decision is governed by *American Trucking*. Under *American Trucking*

[4] The first portion of the Court of Appeals' decision dealt with whether the Mileage Guide was a tariff, whether the carrier was required to participate in the Mileage Guide and whether the carrier's mere reference to the Mileage Guide, rather than its participation therein, satisfied the ICC's regulations. Petitioner does not here contend that the Mileage Guide is not a tariff. Petitioner recognizes that under the ICC's view of its regulations carriers are required to participate in the Mileage Guide and that mere reference to the Mileage Guide as a governing tariff is not sufficient. Nevertheless, those issues are not here addressed because, on the most fundamental issue, it is urged that the ICC lacks authority to retroactively reject or nullify a filed tariff under the circumstances here.

the exercise of the retroactive rejection power must further a specific statutory mandate and the rejection power must be closely and directly tied to that mandate.[5] *American Trucking*, 467 U.S. at 367. The court below found that 49 U.S.C. § 10762(a)(1) of the Act provided the ICC with discretionary authority to retroactively reject the filed tariffs. Pet. App. 19b. However, 49 U.S.C. § 10762 simply cannot be used as a statutory mandate to declare effective tariffs retroactively void. The reason is simple: Congress established 49 U.S.C. § 10762(e) to govern *all* rejections of tariffs established under rules promulgated pursuant to § 10762. The language of § 10762(e) states:

> The Commission may reject a tariff submitted by a common carrier under *this* section if that carrier violates *this* section or regulation of the Commission carrying out *this* section. [Emphasis supplied].

Thus Congress clearly intended *any* regulation concerning the publication of tariffs promulgated pursuant to § 10762 to be governed only by subdivision (e) thereof. However, the sole appropriate statutory mandate which addresses the ICC's authority to reject tariffs tendered to

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[5] The U.S. Court of Appeals for the Eighth Circuit in *Atlantis Express, Inc. v. Associated Wholesale Grocers, Inc.*, 989 F.2d 281 (8th Cir. 1993) incorrectly stated its decision was not governed by *American Trucking*. This is a minority view as all other Courts of Appeals to address this question agree their decisions are governed by *American Trucking*. *See, Freightcor Services, Inc. v. Vitro Packaging, Inc.*, 969 F.2d 1563 (5th Cir. 1992), *cert denied*, 113 S. Ct. 979 (1993). *Brizendine v. Cotter & Co.*, 4 F.3d 457 (7th Cir. 1993). *Overland Express, Inc. v. Interstate Commerce Commission*, 996 F.2d 356 (D.C. Cir. 1993). *Security Services, Inc. v. P-Y Transp., Inc.*, 3 F.3d 966 (6th. Cir. 1993).



it for noncompliance with ICC tariff publishing publications is contained in 49 U.S.C. § 10762(e). This Court has previously held that this statute does not vest the ICC with authority to retroactively reject effective tariffs. *American Trucking, supra*, 467 U.S. at 363-364. Rather, this power is limited to rejection before the tariff becomes effective. The ICC's authority to reject effective tariffs must be based on its " . . . discretion to take actions that are 'legitimate, reasonable, and direct[ly] adjunct to the Commission's explicit statutory power'." *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 655 (1978) (quoting *United States v. Chesapeake & Ohio R. Co.*, 426 U.S. 500, 514 (1976)).

The Court below found that Riss' violations of the tariff publishing regulations were substantive. Pet. App. 22b. Until recently, however, even the Commission has acknowledged that § 10762(a) [formerly 49 U.S.C. § 217(a)] authorized the Commission to promulgate rules relating to form, not substance. *Shobe, Inc. v. Bowman Transportation, Inc.*, 350 I.C.C. 664, 670 (1975).

In *Shobe*, the Commission reviewed a decision wherein one of its Administrative Law Judges had awarded reparations to a shipper where the carrier had published its tariff in violation of ICC tariff publication regulations. The Commission reversed its Administrative Law Judge stating:

> The distinction made by the Administrative Law Judge between substantive and procedural rules prescribed by the Commission under § 217(a) is incorrect. The rules which the Commission is empowered to adopt relate to form, manner, and

> information, none of which is a substantive concept. . . . The remedy for a regulatory violation, rejection by the Commission, is exclusive, as is the penalty: the voiding of the tariff. [citations omitted].

350 I.C.C. at 670.

Thus, while the ICC has previously (and quite correctly) construed § 10762(a) as not providing a mandate to promulgate regulations of a nonsubstantive nature, the Court of Appeals apparently views § 10762(a) as authorizing the Commission to take the substantive action of retroactive voiding a tariff for violation of regulations governing "form, manner, and information". Clearly the Court of Appeals has misconstrued this Court's decision in *American Trucking*.

While the specific rationale of the Circuit Court should be rejected, the correct analysis, however, still lies with the Court's decision in *American Trucking, supra*. That decision holds that the ICC possesses discretionary remedial power not expressly delegated to it if it is closely and directly related to a specific statutory mandate and was designed to achieve objectives set for the Commission by Congress. *Id.*, 467 U.S. at 355-356. The question then is whether the remedial authority should be further extended to include an unlimited power to retroactively reject effective tariffs which violate an ICC tariff publication regulation promulgated pursuant to 49 U.S.C. § 10762(a).

While § 10762(a)(1) authorizes the ICC to prescribe "other information that motor common carriers shall include in their tariffs" this statutory provision is permissive only and does not command the Commission to do



anything. This is not a mandate at all. Rather it is a prescribed authorization to adopt regulations which the Commission has described as relating to "form, manner, and information, none of which is a substantive concept." *Shobe*, 350 I.C.C. at 670. The only "specific statutory mandate" relating to motor common carriers contained in § 10762(a)(1) is that which requires a motor common carrier to "publish and file with the Commission tariffs containing the rates for transportation it may provide. . . . " In analyzing whether the ICC has discretionary authority to retroactively reject a filed tariff, the Court found that "The question presented . . . is whether fashioning this remedy falls within the Commission's authority to modify express remedies to achieve legitimate statutory purposes." *American Trucking*, 467 U.S. at 367. The rate voiding power sanctioned by the Court of Appeals does not modify any express remedy granted to the ICC. Moreover, the net result of allowing a secret rate agreement to control interstate transportation transactions undermines, rather than achieves, a "legitimate statutory purpose" namely the central feature of the Act: the filed rate requirement. *Maislin, supra; Regular Common Carrier Conference v. United States*, 793 F.2d 376, 379 (D.C. Cir. 1986). ICC regulations should promote, not frustrate the Act's principal objective.

In *Overland Express, Inc. v. I.C.C.*, 996 F.2d 356 (D.C. Cir. 1993) the Court of Appeals for the District of Columbia Circuit reached the exact opposite result as the Court below in the matter at bar. In *Overland Express*, the Court of Appeals reviewed and set aside the ICC's decision in *Jasper Wyman, supra*, pursuant to the Hobbs Act. 28 U.S.C. §§ 2321 and 2342. Specifically the Court in *Overland*

*Express* found that the ICC's power to retroactively reject an effective tariff under its discretionary powers did not permit it to void the carrier's tariff merely because the carrier failed to provide a power of attorney to the publisher of the distance guide, stating:

> We rather doubt that [49 U.S.C.] § 10762(a)(1's) permissive authorization for the Commission to require carriers to include other unspecified information is the type of "specific statutory mandate" the court had in mind in *American Trucking*. And the Commission does not seem authorized to reject tariffs retroactively to satisfy a *regulatory* policy not driven by a specific statutory mandate.

*Id.* at 362 [emphasis supplied].

The decision in *Overland Express* specifically found that filed tariffs were effective and could not be declared void by the Commission because of a violation of tariff publishing regulations. 996 F.2d at 361. The reason stated by the court is that voiding a filed tariff undermines the core purpose of the Act which is to provide public disclosure of carrier rates so as to prevent rate discrimination by carriers. *Id.* at 361. Significantly the Court in Overland Express relied upon its previous holding in *Genstar Chemical Ltd. v. ICC*, 665 F.2d 1304 (D.C. Cir. 1981), *cert. denied*, 102 S. Ct. 1750 (1983).

In *Genstar*, a shipper argued that the collection of tariff rates should be precluded because of an alleged unlawfulness in the carrier's tariff which, although filed, did not comply with ICC regulations. *Id.*, at 1308. The shipper had asserted its right to the full refund of an illegal rate increase, "not from the establishment of



unlawful rates but from the unlawful publication of tariffs." *Id.* The shipper further maintained that unlawfully published tariffs could not serve to increase the transportation rate. The shipper objected to the publication because the carrier's increase exceeded previously approved levels and the updated tariffs did not "plainly state the changes proposed to be made in the schedules then in force as required by 49 U.S.C. § 6(3) (now revised as 49 U.S.C. § 10762)." *Id.* at 1308. The shipper also objected to the tariffs because they failed to "contain the appropriate symbols (required by agency regulation) or in any other way indicate the nature of the rate change." *Id.* at 1308. After reviewing these claims of tariff noncompliance the Court held:

> The Supreme Court long ago rejected the view that a tariff on file with the Commission and never rejected by it should be disregarded or treated as nonexistent merely because of some element of substantive unlawfulness in the rate [citation to *Davis* omitted], or some irregularity in the tariff filing formalities [citation to *Berwind* omitted]. The principle in these cases is that where the shipper has been charged no more than the rate reflected in the tariff on file, the remedy for unlawfulness or irregularity is measured not by looking to some other tariff but by the harm, if any, caused by the unlawfulness of irregularity.

*Id.* at 1308.

Here, the record establishes that the Riss rate tariff, including the provision incorporating the distance guide, and the distance guide itself were on file with the ICC and had not been rejected. J.A. 11-27. A tariff on file with

the Commission and not rejected is not to be disregarded or treated as nonexistent merely because of some element of substantive unlawfulness in the rate or some irregularity in tariff filing formalities. *Davis v. Portland Seed Co.*, 264 U.S. 404 (1924); *Berwind-White Coal Mining Co. v. Chicago & E.R. Co.*, 235 U.S. 371 (1914). Although recognizing the D.C. Circuit decision in *Genstar Chemical Ltd., supra*, among others, which held that tariffs were applicable regardless of technical deficiencies, the ICC nevertheless ruled in *Jasper Wyman & Son*, 8 I.C.C. 2d at 259, as follows:

> Here, however, Overland's tariff did not meet even the threshold requirement. Overland sent no distance tariff to the Commission itself, nor in lieu of that did it participate in the distance guides filed by another carrier or agent. Nor did the mileage guide list Overland as a participating carrier. Consequently, Overland's tariffs were not merely 'technically deficient', but, rather, lacked effective provisions necessary to calculate freight charges.

In *Overland Express*, the court recognized however that Overland's tariffs fit the characterization of a filed tariff set forth by the ICC in *Jasper Wyman* "to a tee". *Overland Express*, 996 F.2d at 361 n.5. Riss tariffs also fit that same description to a tee: they "could be considered on file because they at least met the threshold requirement (i.e. they had been sent to the Commission and had not been rejected at the outset)". 8 I.C.C. 2d at 259.



## B. THE INTERSTATE COMMERCE ACT PRESCRIBES THE REMEDIES AVAILABLE TO K MART.

Congress, in regulating carriers, enacted a carefully integrated and complete system of procedures, remedies and penalties. This Court has repeatedly said that the statutory plan must be respected by the courts and the agencies alike, and has forbidden the use of implied or invented remedies which might disturb Congress' delicate balance between carrier and shipper interests. *See, e.g., Southern Ry. v. Seaboard Allied Milling Corp.*, 442 U.S. 444, 456-459 (1979). In this case, the Commission's claim of authority to reject effective tariffs is fundamentally at odds with the statute.

Chronologically, the first step in fixing a new rate, or changing an existing one, occurs when the carrier files with the Commission a new tariff, which may not take effect until a specified advance notice period has elapsed. Section 10762(a)(2). The same section that governs tariff filing provides that the Commission may (but is not required to) reject such a "tariff submitted to it by a common carrier" if the tariff "violates this section or regulation of the Commission carrying out this section." Section 10762(e). This tariff rejection authority is peremptory power on the part of the Commission to reject tariffs filed with it, before they become effective, when the Commission notices in the tariff a defect so patent as to make it pointless to consider the tariff under the Act's more detailed provisions. *American Trucking*, 467 U.S. at 362.

If the Commission accepts the tariff for filing, the next step under the statutory plan allows the Commission to suspend the effectiveness of the new tariff – before it becomes effective – for a period of up to seven months and to commence an investigation into its lawfulness. 49 U.S.C. § 10708(b). The suspension period is limited, however, to the time period prescribed by the statute after which the tariff goes into effect automatically if the Commission has not completed its inquiry. *Id.* At the end of the investigation, the Commission can also prescribe new rates for the future if the filed tariff is found to be unlawful. Section 10704(b)(1).

Finally, if the tariff is filed by the carrier and is neither rejected in advance (under section 10762(e)) nor subjected to suspension and investigation (under section 10708), it goes into effect. But the shipper may file at any time a court complaint for overcharges under 49 U.S.C. § 11706(b) or for damages under 49 U.S.C. § 11706(c)(2). In a suit for overcharges, the carrier may be held liable for "overcharge" liability if it has collected from the shipper more than the rate set forth in the published tariff. In a suit for damages, liability may be imposed under section 11705(b)(3) for "damages" if the carrier has collected the published tariff rate but that rate is unlawful under the substantive standards of the Act (e.g., because it is unreasonably high).[6]

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[6] In such a proceeding, the Commission may also use its prescription power and order adjustment in the tariff rate for the future, if the existing rate is found to be unlawful. See § 10704(b)(1).



The Act also includes an array of specific civil and criminal penalties designed to punish carriers for violations of the Act's provisions. Sections 11901, *et seq.* These penalty provisions include not only specific sanctions for such unlawful conduct as the payment of rate rebates (Sections 11902, 11904) and attempted evasion of regulation (Section 11906), but also general sanctions for willful violation of any provision of the Act or any Commission regulation or order.[7] As noted above, the Act provides that a tariff may go into effect only upon specific statutory notice. K Mart had the opportunity to petition the Commission before the tariff became effective to request the tariff be suspended and investigated pursuant to 49 U.S.C. § 10708. It failed to do so. Any time during the period the tariff was in effect it could have petitioned the Commission to set the tariff aside for the future pursuant to 49 U.S.C. § 10704(b)(1). It failed to do so.

With respect to tariffs which have gone into effect, the Act imposes on carriers two explicit forms of liability, damages liability, §§ 11705(b)(3) and 11706(c)(2) and overcharge liability, § 11706(b). Damages serve to make a shipper whole for any *actual injury* it has suffered. Here there has been no injury as the shipper is merely being asked to pay a tariff rate that has not been found by the Commission to be unreasonable.

The Motor Carrier Act provides specific, detailed procedures for challenging tariffs either upon submission, or after a filing. These specific and distinct remedies

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[7] See, e.g., § 11914(a) (fine prescribed for each day a rail carrier violation continues); § 11914(b) (fine prescribed for each day a motor carrier violation continues).

provide no authority for the Commission's claimed power to overturn filed tariffs which violate tariff publishing rules by treating them as retroactively void. Nothing suggests that Congress has intended to overturn this Court's established precedents or to permit rejection of common carrier tariffs after they had taken effect except within the limited circumstances outlined in *American Trucking*.

In sum, Congress has never given the ICC the broad nullification power set forth in 49 C.F.R. § 1312.4(d). Significantly, the Commission in § 1312.4(d) does not point to any specific statutory mandate which is furthered by its nullification rule. The remedies Congress has prescribed are specific. In *Consolidated Rail Corp. v. National Ass'n. of Recycling Industries*, 449 U.S. 609 (1981) the Court confirmed its long-held view that the Act's remedies are an integrated whole not lightly to be altered or enlarged by court or agency.

The strained distinctions by the Court of Appeals miss the critical fact: Riss' tariffs, including the provisions incorporating the distance guide, were filed. Adherence to filed tariffs is settled law. K Mart's remedies are those available to it under the Act; its remedy is not to retain the benefit of its secret rate. The effect of the Court of Appeals' decision is to suspend or ignore Riss' tariffs even without any prior action by the ICC addressing the lawfulness of the tariffs. This result is contrary to this Court's precedent.

In *Atchison, T. & S.F. Ry. Co. v. Wichita Board of Trade*, 93 S. Ct. 2367 (1972) the court reviewed the action of a trial court which had sought to enjoin new rates from



going into effect and had remanded the case to the ICC for a determination of the reasonableness of the tariff. The court found that it was error for the trial court to enter the injunction. *Id.* at 2380. The Court in *Wichita Board of Trade* also acknowledged the shipper's remedy:

> A shipper can challenge any such rate as unreasonable and, if he succeeds, may recover reparations. In addition, the Commission may prescribe a rate to be charged in the future.
>
> * * *
>
> For a period of up to seven months, the carriers may not collect the [rate] increase if the Commission suspends them. . . . If the increase is ultimately found unjustified, the Commission may order a refund. 49 U.S.C. § 15(7). Even if the Commission does not do so in a suspension proceeding, *the shippers may recover reparations* under some circumstances. [emphasis supplied]

*Id.* 412 U.S. at 812, 93 S. Ct. 2377.

Thus, this Court's precedent makes clear that K Mart's remedy was to seek suspension of the rates before they were effective, or to seek reparations thereafter. It has done neither.

In *Davis v. Portland Seed Co.*, 264 U.S. 404 (1924), a shipper contended that the tariff rate charged him – which admittedly was unlawful because it violated the Act's long-haul short-haul provision – should be treated as "non-existent" and that it should be allowed to recover on the basis of the lower rate charged favored shippers. The Court explicitly rejected the notion that a filed and effective tariff could be treated as "non-existent" (264 U.S. at 416, 422), holding that the shipper was entitled to

recover only any actual damages it had suffered (e.g. due to loss of business). See also *Texas & P. Ry. v. Cisco Oil Mill*, 204 U.S. 419 (1907) (filed and effective tariff could not be treated as a nullity because of alleged failure to comply with requirements that tariff be posted for public inspection).

This long-established principle that a filed and effective tariff may not be treated as a nullity contributes to the Act's goals of promoting certainty and protecting reliance on the filed tariff rates. Goods are shipped, revenues are collected, and business plans of carriers and shippers alike are formulated in reliance on established and effective rates. Carriers also have proceeded on the premise that tariff rates, if not unreasonably high, may be retained by them and are not liable to be repaid based on some defect unrelated to the substance of the rate.

In one of its earliest decisions under the Act, this Court said that "before any party can recover under the act he must show not merely the wrong of the carrier, but that the wrong has in fact operated to his injury." *Parsons v. Chicago & N. W. Ry.*, 167 U.S. 447, 460 (1897). Even for tariff provisions specifically declared by the Act to be unlawful, a shipper is not entitled to a refund "without other proof of actual damage." *Davis, supra*, 246 U.S. 403, 415.[8] As this Court explained in *Pennsylvania R.R. v. International Coal Mining Co.*, 230 U.S. 184,200 (1913), Congress

[8] The ICC's earlier policy did not compel a refund of all charges collected under a tariff filed without strict compliance with the provisions for tariff filing. See for example *Ralston Purina Co. v. Atlantic B. & C. R.*, 174 I.C.C. 722 (1931); *Concrete Engineering Co. v. Baltimore & O.R.*, 160 I.C.C. 675 (1930); *Southern Transportation Co. v. Norwalk & W. Ry.*, 147 I.C.C. 29 (1928);



did not intend to enable "persons not injured" to recover under the Act.

In *Reiter v. Cooper*, 507 U.S. ___, 113 S. Ct. 1213 (1993) the Court recently reaffirmed the long-standing principle that shippers may obtain redress only for actual injuries sustained and then only pursuant to specific remedies accorded by the Act itself. 113 S. Ct. at 1219. Significantly, the shipper in *Reiter* argued that the rates contained in the carrier's tariff were unlawful, i.e. unreasonable, thus precluding the carrier's recovery of tariff charges. The Court, while allowing the shipper to assert its unreasonable rate claim as a setoff against the carriers claim for tariff charges, specifically found such setoff to arise from the reparations provision of the Act, 49 U.S.C. §§ 11705(b)(3) which:

> . . . gives shippers an express cause of action against carriers for damages (called "reparations" in the pre-codification version of the statute, see 49 U.S.C. § 304(2), (5) (1976 ed.)) in the amount of the difference between the tariff rate and the rate determined to be reasonable by the ICC, § 11705(b)(3)

113 S. Ct. at 1217.

Congress established clear and specific limits on the fines and other penalties that may be imposed upon carriers under the various express penalty provisions set forth in the Act. Despite such precision, the Court of

*Greene Cananea Copper Co. v. Chicago R.I. & P. Ry.*, 88 I.C.C. 225 (1924). The Commission in these cases repeatedly rejected arguments that a filed tariff should be treated as nonexistent because it was inconsistent with a Commission order.

Appeals contends that Congress, in the single bland sentence of section 10762(a)(1), authorizing the ICC to prescribe information to be contained in tariffs, has conferred upon the Commission undefined and unlimited discretion to retroactively void effective tariffs. Given the principles that have guided the interpretation of the Act in the past, such a construction is wrong as a matter of law.

## CONCLUSION

For the foregoing reasons, the Riss rate tariff is effective and the judgment of the Court of Appeals below should be vacated.

Respectfully submitted,

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